SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

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No. 71-218

RALPH GROUNDS, HENRY HITCH, ET AL. (LANDOWNERS),
Petitioners,

vs.

NORTHERN NATURAL GAS COMPANY, ET AL. (HELEX GROUP),

and

SOCONY MOBIL OIL CO., INC. (MOBIL OIL CORPORATION substituted), ET AL. (LESSEE-PRODUCERS),
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONSE OF LESSEE-PRODUCERS TO LANDOWNERS' PETITION FOR REHEARING

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONSE OF LESSEE-PRODUCERS TO LANDOWNERS' PETITION FOR REHEARING

This response is filed by all twelve Lessee-Producer respondents in compliance with this Court's request dated December 14, 1971.

STATUTE INVOLVED

28 U.S.C., § 2101 (c):

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

QUESTION PRESENTED

Whether petitions of the Helex Group to the Court of Appeals for rehearing judgments against them and in favor of the Lessee-Producers in six separate actions in the nature of interpleader suspend the finality of judgments in these actions against the Landowners and in favor of the Lessee-Producers and the Helex Group, and also the finality of judgments against the Landowners and in favor of the United States in an action under the Tort Claims Act and an action under the Tucker Act.

STATEMENT AND ARGUMENT

The Landowners' petition for rehearing of this Court's order denying their petition for a writ of certiorari as out of time relies upon petitions for rehearing filed in the Court of Appeals by the Helex Group as suspending the finality of judgments of that Court against the Landowners and thus extending the time allowed by 28 U.S.C. § 2101(c) for filing their petition for a writ of certiorari.

The Landowners' petition for rehearing should be denied because their petition for a writ of certiorari in this Court and the petitions for rehearing of the Helex Group in the Court of Appeals are addressed to separate judgments in separate controversies between different litigants.

The judgment of the Court of Appeals (A. 185) shows that it entered several and separate judgments in eighty-eight separate appeals from judgments entered in the United States District Court for the District of Kansas. Its opinion shows (A. 146) that these judgments were entered in six actions in the nature of interpleader and an action under the Tucker Act and an action under the Tort Claims Act. Its opinion also shows that its eighty-eight separate judgments fall into three groups: one upon the appeals by the Helex Group, one upon the appeals by the Landowners, and one upon the appeals by the Lessee-Producers.

With the judgments upon the appeals of the Helex Group, we are not now concerned since they were from the trial court's judgment assessing costs against the interpleaded funds and the Court of Appeals' "disposition of the case makes necessary reconsideration of the cost issue by the trial court" and the Court of Appeals expressed "no opinion with regard thereto" (A. 184).

The opinion of the Court of Appeals shows that by its judgments upon the other appeals "the judgments [of the District Court] are severally affirmed" (A. 184) in the Tort Claims action and Tucker Act action and that

> "In the interpleader actions, the judgments are severally reversed and the cases remanded to the district court for further consideration in the light of this opinion." (*Id.*)

The opinion shows (at A. 152-165) that the judgments upon the Landowners' appeals are a denial of their claim, made in all eight actions, to the value of helium produced from their lands on the ground that oil and gas leases "cover only combustible oil and gas" and not inert commingled helium (A. 152) under the local law of Texas, Oklahoma and Kansas. Upon consideration of this claim,

the Court of Appeals concludes "absent specific reservations, the grant of gas by the leases covered all components of the gas, including helium" (A. 164). Without having filed a petition for rehearing in the Court of Appeals, the Landowners now seek review in this Court of the judgments denying their claim by a petition for a writ of certiorari filed more than one hundred fifty days after the judgments were entered.

The opinion of the Court of Appeals also shows that in the interpleader actions its judgments on the Lessee-Producers' appeals sustain the claim of "the leasee-producers [to] recover from the fund the reasonable value of the helium content of the processed gas" (A. 183). As the opinion shows, this claim is based on § 11 of the Helium Act, 74 Stat. 922, 50 U.S.C. § 167i, and the federal law of rate regulation (A. 172-178). The Helex Group opposed this claim on the ground that commingled helium is covered by the FPC service rates which they have paid us for the helium-bearing natural gas (*Id.*). The Landowners were not parties to and did not participate in this controversy, since the Lessee-Producers have always acknowledged that we are obligated to pay royalty to the Landowners upon any recovery out of the interpleaded funds in accordance with the applicable oil and gas leases (A. 165). The Helex Group filed timely petitions for rehearing in the Court of Appeals, which were denied, and timely petitions for a writ of certiorari in this Court in Nos. 71-238 and 71-243.

These are the facts which show that the Landowners' petition for rehearing is premised upon two misapprehensions: (1) that consolidation for purposes of hearing below effectuated a merger of the separate cases; and (2) that the Landowners' claims for helium payment, involving the issue of oil and gas lease coverage of helium, were

intertwined with Lessee-Producers' claims against the interpleaded funds.

The fact is that the Order Directing Procedure entered by the Court of Appeals (Pet. for Reh. A. 9) shows on its face that the appeals were not consolidated "for all purposes" as the Landowners' petition asserts (Pet. for Reh. 2), but that they were consolidated "for hearing in this Court." (Pet. for Reh. A. 9) Following the entry of the Order, the three claimants pressed their separate adverse claims in the Court of Appeals. The Court of Appeals entered several and separate judgments upon the separate claims of the Landowners and the Lessee-Producers, which rest upon separate grounds. It considered these claims separately in different parts of its opinion. Some of its judgments deny the Landowners' claim to the entirety of the interpleaded funds. Others sustain the claim of the Lessee-Producers to a portion of the funds. The two sets of judgments decided separate controverises between different litigants, one based on state law and the other based on federal law. The petition for a writ of certiorari of the Landowners in this case seeks review in this Court of separate judgments and different claims and presents separate questions than do the petitions for a writ of certiorari of the Helex Group in Nos. 71-238 and 71-243. Consequently the petitions for rehearing of the Helex Group in the Court of Appeals should not suspend the finality of the separate judgments against the Landowners and extend their time for filing their petition for certiorari in this Court.

On a consolidation, the "actions retain their separate identity, and the parties and pleadings in one action do not automatically become parties and pleadings in the other action." 5 Moore's Federal Practice, § 42.02, p. 42-22. The United States was never a party to the interpleader actions. The fact that the Attorney General argued in favor of the Helex position did not and could not make the United

States a party. Jurisdiction of the interpleader cases rested on funds constituting proceeds received by Helex Companies from the United States in payment for helium extracted from the natural gas. The United States had no claim to any portion of those funds, and has never asserted any such claim. Since the fund itself "marks the outer limits of the controversy," *State Farm Fire & Cas. Co.* v. *Tashire*, 386 U.S. 523, 534 (1967), joinder of the United States would have been beyond the jurisdiction of the Court. Nor could the consolidation below have made these respondents, who were parties only to the interpleader actions, parties to the two actions against the United States. *United States* v. *Sherwood*, 312 U.S. 584 (1941). In those two actions the judgments entered by the Court of Appeals affirmed the judgments below in favor of the United States and against the Landowners. Neither Landowners nor any other party filed a petition for rehearing of those judgments. Consequently, they undeniably became final on March 2, 1971, more than one hundred fifty days before Landowners filed their petition for certiorari.

The authorities relied on by Landowners are inapplicable to these cases. We recognize the general principle that a timely petition for rehearing below by the appealing party defers the finality of the judgment for appeal purposes until it is denied, *United States* v. *Healy*, 376 U.S. 75 (1964); *United States* v. *Adams*, 383 U.S. 39 (1966) and disposition below of only some of the parties' claims is considered non-final when the claims are joint, or inseparable. *Hohorst* v. *Hamburg-American Packet Co.*, 148 U.S. 262 (1893); *National Bank of Rondout* v. *Smith*, 156 U.S. 330 (1895); *United States* v. *Girault, et al.*, 11 How. 22 (1850). It is in that context that the rule of finality, which "requires that the judgment to be appealable should be final not only as to all the parties, but as to the whole subject matter and as to all the causes of action

involved", *Andrews* v. *United States,* 373 U.S. 334 (1963), *Collins* v. *Miller,* 252 U.S. 364 (1920) must be interpreted.

When separate judgments decide separate controversies between different parties, the settled rule of this Court is that the finality of one judgment for appeal purposes does not depend upon the finality of another. In *United States* v. *River Rouge Imp. Co.,* 269 U.S. 411 (1926), numerous eminent domain cases were consolidated for trial, and for hearing by the Court of Appeals. This Court reviewed fifteen judgments of the Court of Appeals, although the sixteenth lacked the requisite finality. The opinion says at 269 U.S. 414:

> ". . . While the general rule requires that a judgment of a Federal court shall be final and complete before it may be reviewed on a writ of error or appeal, it is well settled that an adjudication final in its nature as to a matter distinct from the general subject of the litigation and affecting only the parties to the particular controversy, may be reviewed without awaiting the determination of the general litigation. [citations omitted] . . . And so, conversely, an adjudication final in its nature as to the general subject of the litigation may be reviewed without awaiting the determination of a separate matter affecting only the parties to such particular controversy."

This rule is applicable whenever a Court of Appeals' judgment has "terminated a separable and distinct segment of the litigation." *National City Bank* v. *Republic of China,* 348 U.S. 356, 358 (1955), Footnote 2. The question is whether the judgment below "put to rest the questions which the parties had litigated in the Court of Appeals." *Federal Trade Com.* v. *Minneapolis-Honeywell R. Co.,* 344 U.S. 206, 213 (1952). Or, as similarly stated, the question is whether the record shows "that the order

of the appellate court has in fact fully adjudicated rights and that the adjudication is not subject to further review. . . ." *Department of Banking* v. *Pink*, 317 U.S. 264, 268 (1942).

In these cases, as in the *River Rogue* cases, ere were final and complete adjudications of different claims of different litigants. In our cases, one adjudication denied the claim of the Landowners to the interpleaded funds and to recover the value of helium from the United States. The other adjudication denied the claim of the Helex Group to all of the interpleaded funds and sustained the claim of the Lessee-Producers to a part thereof. Each of these adjudications "terminated a separable and distinct segment of the litigation." *National City Bank* v. *Republic of China, supra.* Consequently, the finality of the adjudication against the Landowners should not depend upon the finality of the adjudication against the Helex Group and the petitions for rehearing of the Helex Group in the Court of Appeals should not suspend the finality of the adjudication against the Landowners.

In actions in the nature of interpleader, as in all other actions, each of the three adverse claimants to the interpleaded funds should be the champion of its own rights and, if the Landowners desired reconsideration in the Court of Appeals of the adjudication against them, they should have filed their own petition for rehearing. Since they did not, the finality of the judgments against them was not suspended.

CONCLUSION

This Court was entirely correct when it denied the Landowners' petition for a writ of certiorari as out of time. Their petition for rehearing should also be denied. If the petition for rehearing is granted, the petition for certiorari should be denied on the merits for the reasons stated in our brief in opposition.

Respectfully submitted,

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